SUBMISSIONS OF THE NORFOLK ISLAND GOVERNMENT

JOINT STANDING COMMITTEE ON THE NATIONAL CAPITAL AND EXTERNAL TERRITORIES INQUIRY INTO NORFOLK ISLAND ELECTORAL MATTERS

FEBRUARY 2001

Submission of the

NORFOLK ISLAND GOVERNMENT

FEBRUARY 2001

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ABBREVIATIONS

"Islands in the Sun"	Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on The Legal Regimes of Australia's External Territories. AGPS, Canberra, March 1991
"Nimmo"	Report of the Royal Commission into matters relating to Norfolk Island. AGPS, Canberra, October 1976
"the Act"	*Norfolk Island Act 1979* of the Commonwealth

SUBMISSION OVERVIEW

Only 19 months ago, the Norfolk Island Government provided a detailed submission dealing with the matters presently under reference together with other important issues concerning firearms, and the position of the Deputy Administrator under the *Norfolk Island Act 1979*.

Those submissions were a specific response to the proposed *Norfolk Island Amendment Bill 1999 (Cwth)*. It has been less than a year since that Bill was rejected by the Senate in its entirety.

In the intervening period, the Norfolk Island Government has worked hand in hand with the Commonwealth government to address issues of mutual concern relating to firearms and immigration. The Norfolk Island Government has passed laws to ensure that Norfolk Island's firearms legislation adopted the standards existing in the Australian States and Territories[1]. Further, the Norfolk Island Government has acted promptly to close any immigration loopholes which might be of concern to the Commonwealth and has recently passed legislation requiring the possession of an Australian visa for travel to Norfolk Island by non-Australian citizens[2].

Given the spirit of co-operation which has always existed between the Norfolk Island Government and the Commonwealth, it is of significant concern that the current inquiry has re-emerged, and seeks to address issues which are squarely within the legislative responsibility of the Norfolk Island Government. That responsibility arises both under the provisions of the *Norfolk Island Act 1979* (subsection 31(3)), and under current Norfolk Island legislation (*Legislative Assembly Act 1979*).

The re-visiting of Norfolk Island electoral issues on the initiative of the Federal Minister makes it abundantly clear that the Federal Government has failed to understand or appreciate the unique community, traditions, and culture which exist in the territory.

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[1] Firearms Amendment Act 1999
[2] Immigration Amendment Act 2001

Of necessity, the current submission re-asserts some matters raised in response to the previous inquiry and proposed Bill.

The Norfolk Island Government is keen to dispel any misunderstanding which exists concerning the unique mechanisms of residency and electoral status required within the territory, and to explain the incompatibility of Australian electoral provisions within the Norfolk Island community.

The effort and resources which have been required to respond to these issues a second time, would have been better spent in mutual Government consultation.

The time period before which an Australian citizen resident in the Territory can enrol to vote for the local legislature

The second part of the specific terms of reference has been addressed first in this overview. An understanding of this issue is integral to an understanding of the whole.

The Norfolk Island Community has unique traditions of culture, history, and language which set it apart from Australian mainland communities. The Territory is not regional Australia - it has a separate identity.

It is a Community which exists within a fragile environment and with a fragile economy. The body of legislation receiving assent since the commencement of self-government in 1979 has reflected the needs of a small Community comprising some 1356 permanent residents (as at October 2000) and a smaller population who reside temporarily on the Island for specific purposes. The most recent population analysis appears below (see fig 1).

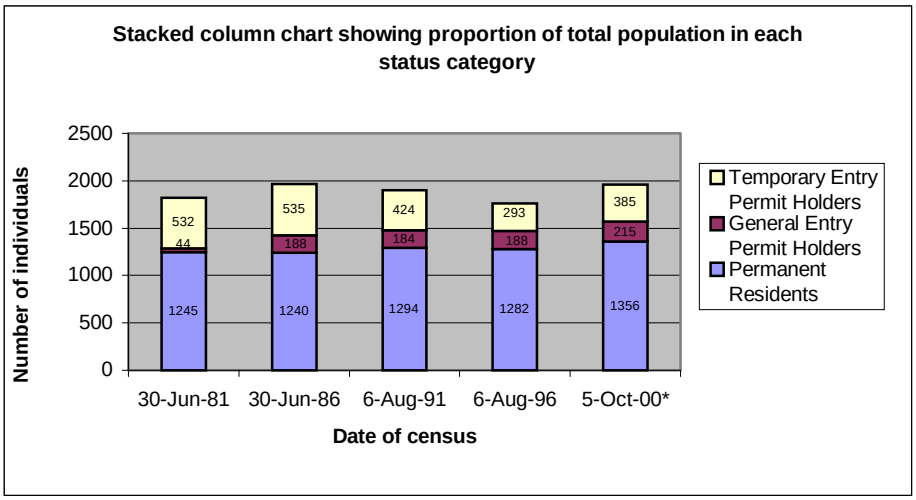

Figure 1 : Source – Census and * immigration records

In particular, the immigration laws of the territory recognise the need for a developed relationship with Norfolk Island culture and Community as a pre-requisite for permanent or long term residence. The fragility of the environment and economy, and the unique traditions and isolation of the Community, dictate a lengthy period of assimilation, or an existing special relationship, to establish permanent residence status.

This is an important difference, from an electoral point of view, to the situation which exists in the Australian States and internal Territories. In those jurisdictions, the ability to reside permanently in an area is not in issue, and goes hand in hand with the right to enrol to vote. In any democratic community, residence and voting rights must co-exist. This applies equally in Norfolk Island, however the right to residency is more complicated and is not automatic.

Accordingly, any proposal to seek consistency relating to voting eligibility in Australian jurisdictions and Norfolk Island is based on the false premise that there is consistency in rights of residence. There is no such consistency.

In fact, the consistency argument works in favour of the status-quo. Over the last twenty years the Norfolk Island Government has developed legislation which recognises and is based on its separate identity and culture - the unique requirements

of its immigration, residence, and electoral policies. At the present time the Norfolk Island Government is working in conjunction with Commonwealth agencies to develop a planning regime which adopts those policies as an integral part of future development and environmental protection. Any departure from those policies would attack the integrity of the overall legislative framework.

The Norfolk Island Government asserts that the current requirement to reside in the Territory for 900 days of the past 4 years as a pre-requisite to electoral eligibility is sound policy in all the circumstances. This assertion has been supported by two separate, and wide ranging, Federal inquiries[3]. A change in that requirement would strike fundamentally at the identity of the community, and the culture it espouses. It would dissemble the careful development of the physical and cultural attributes which make the Territory unique and predicate its policies.

Moreover, the current electoral policies are fully supported by the community. Proposals for change, and the imposition of Australian citizenship as a requirement for voting/candidacy eligibility, have been rejected by community referendum three times in the last ten years[4]. There are no locally generated concerns in respect of these issues, and the Federal Government has no mandate to impose change unilaterally.

Whether Australian citizenship should be a requirement relating to eligibility to vote for, or be elected to, the Legislative Assembly

The Norfolk Island Government, after a process of consultation with the Federal Government, has recently passed legislation which ensures that certain persons who travel to and remain in the territory must have an Australian visa. That initiative alone should assuage any concerns of the committee that persons having any foreign allegiance could participate in the future electoral processes of the Territory without meeting appropriate immigration protocols which have been developed jointly by the Norfolk Island Government and the Commonwealth.

[3] Nimmo Report, Islands in the Sun Report
[4] Referendum Results: December 1991, August 1998, May 1999

The Norfolk Island Community is already comprised of persons with diverse nationalities - substantively Australian, with a minority New Zealand and United Kingdom citizens (see fig 2). Neither the community, nor the Norfolk Island Government, have ever placed faith in a system of electoral eligibility based on a single administrative requirement (for example Australian citizenship). The requirement in Norfolk Island is far more rigorous and requires an acceptance of the physical and cultural attributes of the Territory evidenced over a period of time.

The requirement is fundamental to the preservation of the Territory's identity and cultural heritage and reflects a self development policy for the community which was enshrined within the *Norfolk Island Act 1979*. It reflects a dynamic cultural approach to residency which must be preserved if the intent and purpose of the *Norfolk Island Act 1979* is to be achieved. The committee is reminded of a preliminary statement within the Act as follows :-

"***AND WHEREAS the Parliament recognises the special relationship of the said descendants with Norfolk Island and their desire to preserve their traditions and culture:…***"

Current eligibility requirements for both voting in, and standing for, Territory elections have worked well, and have resulted in a stable community of residents responsive to the needs of the Island, and their position within an external Territory under the authority of the Australian Commonwealth. Any fears the Federal Government may have in this regard are fictitious and without foundation. The Norfolk Island Community in the past, during the two world wars, and at the present time, has consistently exhibited a loyalty to Australia, and an ability to work with the Federal Government.

Altering eligibility requirements could only be of cosmetic value to the Federal Government, but would significantly harm the Norfolk Island community. A proposal of this nature would immediately **disenfranchise** and **discriminate** against a section of the Community whose members currently see themselves as indistinct from the rest of the Norfolk Island population. In effect, it would fractionalize a formerly cohesive population.

The proposal, if adopted, seeks to take a responsibility which is in the hands of the Norfolk Island Government under the terms of the *Legislative Assembly Act 1979*, and transfer that responsibility to a remote legislature. Such a move is at odds with the intent and purpose of the *Norfolk Island Act 1979*, and interferes with the progress of self-government instituted by the Federal Government. To describe such a proposal as a backward step would be an understatement. A move of this significance would alter the benchmarks which were set for self-government more than twenty years ago, and which the Territory Community has assiduously worked towards.

Consistency of approach

The Federal and Norfolk Island Governments have developed a regular dialogue concerning Territory issues since 1979. Inter-governmental meetings, representation on ministerial committees, and an exchange of information through the Administrator's office, have all led to a consistent and uniform approach to legislative change within the Community. The current and previous inquiries are a departure from that approach and are not helpful. These inquiries, and their terms of reference have arisen unilaterally, and separately from the existing mechanisms of inter-governmental consultation. The re-emergence of the current inquiry is inappropriate in that sense, and is inconsistent with a successful and established process of consultation spanning three decades. The agenda of the Federal Minister's referral to the Joint Standing Committee is political, and remote from the needs or concerns of the Norfolk Island Community.

It is noted that the terms of reference of the current inquiry are on the agenda for the forthcoming 2001 inter-governmental meeting scheduled for March 2001. This is the appropriate forum for discussion of these issues.

Finally, a submission dated 28 May 1999 from the President of the Law Society of New South Wales was forwarded to the then Secretary of the Australian Senate Legal and Constitutional Legislation Committee. This was in response to the proposed Norfolk Island Amendment Bill 1999, and covered the same issues presently under reference. That submission outlined the view of the Law Society's Practice and Community Service Division, and concluded that the Commonwealth proposal to

impose electoral change was not in accordance with the rights of minorities under the United Nations Charter, and the International Covenant on Political Rights. A copy of that submission is appended[5].

The Norfolk Island Government seeks a conclusion from the committee which will promote measures to preserve the existing mechanisms of self-government and inter-governmental consultation.

Norfolk Island Government

February 2001

SUBSTANTIVE SUBMISSION

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[5] See Appendix A

ELECTORAL ISSUES

General background

1. The terms of reference of the inquiry set out:

   (a) A requirement of Australian citizenship as an additional qualification for future enrolment on the Island's electoral roll;

   (b) a requirement of Australian citizenship as an additional qualification for election to the Legislative Assembly (and hence the holding of executive office within the Norfolk Island Government); and

   (c) to make the residence period for eligibility for enrolment consistent with periods applicable in Australia.

2. These matters are heavily controversial, and have been rejected by successive Norfolk Island Governments and also by the Norfolk Island Community in two successive referendums, held on 26 August 1998 and 12 May 1999.

3. The *Norfolk Island Act 1979* (the Act) does not currently include, and never has, provisions dealing with qualifications for enrolment on the Island's electoral roll, save for the empowering provision that "... the members of the Legislative Assembly shall be elected as provided by [Norfolk Island] enactment" (subsection 31(3)).

4. The Act does however currently include provisions relating to qualifications for, and disqualifications from, membership of the Assembly. These are set out in sections 38 and 39 and are in outline as follows:

Qualifications:

- Has attained the age of 18 years.
- Is entitled or qualified to become entitled (under Norfolk Island law) to vote at Legislative Assembly elections.
- Has been ordinarily resident in Norfolk Island for 5 years immediately preceding the date of nomination.

Disqualifications:

- Is an undischarged bankrupt.
- Has been convicted and is under sentence of imprisonment for one year or more for a Federal, State or Territory offence.
- Is a Federal or Norfolk Island police officer.

5. In addition to the above disqualifications, a member of the Assembly vacates his or her office if the member fails to attend 3 consecutive Assembly meetings without permission, or takes or agrees to take remuneration for services rendered in the Assembly except in accordance with applicable laws relating to the remuneration of members.

6. As originally enacted in 1979, the above provisions in the Act relating to qualifications for, and disqualifications from, Assembly membership included the further requirement that the relevant person was, and remained, a person who:

> "... is an Australian citizen *or otherwise has the status of a British subject*".

7. The provisions which included that requirement (paragraphs 38(a) and 39(2)(b)) were repealed by the Commonwealth in 1985: *Statute Law (Miscellaneous Provisions) Act (No. 1) 1985*, with effect from 3 July 1985.

8. The equivalent requirement for enrolment on the electoral roll (which, as stated above, arose under local law and not under the Act) was found in what was then paragraph 6(1)(a) of the *Legislative Assembly Act 1979* [see Note below] which required that an applicant for enrolment be a person who:

> "is an Australian citizen *or otherwise has the status of a British subject*".

9. That provision was repealed with effect from 4 December 1986 by Norfolk Island's *Statute Law Revision (Status) (No. 3) Act 1986*.

10. It is important to note that abolition of the citizenship/British subject status requirement, at both a Federal and Norfolk Island level, was a Commonwealth initiative. This is further discussed below, at paragraphs 34-36.

11. So far as the residence period for eligibility to enrol is concerned, since self-government (and before) that has been a matter exclusively governed by Norfolk Island law.

12. The present requirement, which arises under the *Legislative Assembly Act 1979* as currently in force, is that a person is entitled to enrolment if the person has attained the age of 18 years and:

> "has been present in Norfolk Island for a total of 900 days during the period of 4 years immediately preceding the person's application for enrolment".

13. This equates to an aggregate period of slightly less than 2 ½ years.

14. The inquiry terms of reference raise a possibility that would override the above provision with a differently expressed and much shorter residence qualification.

Note: The Legislative Assembly Act 1979 was originally enacted, immediately prior to self-government and in preparation for it, as the Legislative Assembly Ordinance 1979 (Ordinance No. 5 of 1979). Under the Citation of Laws Act 1995, former Ordinances have been re-named "Acts".

15. If such a possibility came to pass, it would be the first time that Federal law has made provision for Norfolk Island electoral enrolment qualifications.

Detailed background – residency qualifications for enrolment

16. There is a lengthy history of reserving local voting rights to bona fide long-term residents. The general political rationale for this is that, as Norfolk Island is a uniquely fragile and sensitive polity, only those with a demonstrable long-term commitment to the Island should participate in its governance.

17. Until the 1960s, no special measures were necessary to achieve the above aim, as the number of persons who went to live in Norfolk Island before then was not significant[6].

18. By the mid-1960s, however, the numbers of both visitors and settlers had started markedly to increase, and in response new immigration legislation was promulgated to supersede the obsolete *Immigration Restriction Ordinance 1922*. The new legislation (the *Immigration (Temporary Provisions) Ordinance 1967*, followed by the *Immigration Ordinance 1968*) provided a mechanism which enabled eligibility to vote for the then Norfolk Island Council to be linked to immigration status. Accordingly, by amendments made in 1968 to the *Norfolk Island Council Ordinance 1960*, enrolment qualifications were enacted which drew a distinction between people with temporary immigration status (who needed to have "lived in" Norfolk Island for 12 months in order to qualify to vote), and those with permanent immigration status (who needed to have "lived in" Norfolk Island for 6 months in order to qualify).

19. This distinction remained operative until 1976, when the ability of temporary permit holders to vote was abolished. Thereafter, the enrolment qualification was 6 months' ordinary residence plus the holding of permanent immigration status.

20. That change was favoured by the Nimmo Royal Commission, which reported in 1976:

> "Until a recent amendment … to the Norfolk Island Council Ordinance 1960, itinerant workers in the Island and other persons who had been ordinarily resident in the Island for the previous 12 months could exercise a vote in elections for the Island's Council. *The Commission agrees with the policy behind the amendment which restricts eligibility to vote largely to bona fide long-term residents or those intending to be such; eg holders of certificates of residency or enter and remain permits. Itinerants are excluded*" (Nimmo, page 351. Emphasis added.)

21. The formal linkage between immigration status and voting rights remained the basis for enrolment eligibility until 7 February 1985, when the *Legislative Assembly (Amendment) Act 1984* came into operation. That Act provided for a residency

[6] Nimmo Report at page 258

requirement of "a continuous period of 3 years" or alternatively "periods totalling 2 years and 6 months during the period of 3 years" prior to the application for enrolment. However, this was coupled with a requirement that the applicant satisfy the Administrator "… that he proposes to live in Norfolk Island indefinitely". As this latter requirement was in practice usually met by demonstrating to the Administrator that the applicant held permanent immigration status, the general effect of the legislation was similar to that previously in force.

22. This was the form in which the legislation stood when the House of Representatives Standing Committee on Legal and Constitutional Affairs undertook its inquiry into the Legal Regimes of Australia's External Territories during the period 1988 to 1991. The Committee's report, "Islands in the Sun", was published in March 1991.

23. The Committee conducted public hearings in Norfolk Island on two occasions, spanning 3 days in all, and took into account numerous submissions relating to Norfolk Island (including 6 submissions from the Norfolk Island Government over the period March 1989 to February 1991). The chapter of Islands in the Sun which deals with Norfolk Island was 32 pages in length, and included 9 recommendations. The first of the Committee's specific terms of reference was "… the degree to which the citizens of the Territories receive the same benefits, rights and protection under the law as other citizens of the Commonwealth of Australia".

24. In the context of its comprehensive inquiry into that term of reference, the Committee considered the issue of the residency requirement for enrolment on the Norfolk Island electoral roll:

> "The right to vote in elections for the Norfolk Island Legislative Assembly and in referendums is currently available to persons resident in the Island for a period of 3 years (or 2 years and 6 months in the preceding 3 years) who satisfy the Administrator that they intend to reside permanently on the Island.
>
> *The Committee is satisfied that the current residency provision should remain unchanged*" (Islands in the Sun, page 149, paragraphs 7.12.3, 7.12.4. Emphasis added.)

25. The residual link with immigration status was finally broken by the *Legislative Assembly Amendment Act 1991*, which commenced on 7 August 1991. That Act sought to address problems that had arisen with respect to precisely what was connoted by the phrase "resided in Norfolk Island", as it appeared in the pre-existing legislation. The solution adopted was a quantitative count of days on which the applicant had been "present" in Norfolk Island, so that questions of intention and the like became irrelevant. The full provisions relating to new enrolments, and re-enrolments after a period off the roll, are currently those enacted in 1991, and are as follows:

> "**Qualifications for enrolment**
> **6.** (1) Subject to subsection (3), a person is entitled to enrolment if the person -

(a) has attained the age of 18 years; and

(b) has been present in Norfolk Island for a total of 900 days during the period of 4 years immediately preceding the person's application for enrolment.

(2) Subject to subsection (3), a person whose name has been removed from the electoral roll under paragraph 7(1)(b) or (c) is entitled to enrolment if the person has been present in Norfolk Island for a total of 150 days during the period of 240 days immediately preceding the person's application for enrolment.

(3) A person who has been convicted, whether in Norfolk Island or elsewhere, and is under sentence of imprisonment for one year or longer for an offence against the law of the Commonwealth or of a State or Territory is not entitled to enrolment during the period of his imprisonment.

….

Alteration of roll

7. (1) The Returning Officer shall cause to be removed from the electoral roll the name of a person who -

(a) is dead;

(b) has been absent from Norfolk Island for more than a total of 150 days during the period of 240 days immediately preceding the day on which the electoral roll is closed in accordance with section 8; or

(c) has ceased to be entitled to enrolment by reason of the application of subsection 6(3).

….

Calculation of presence in Norfolk Island

7A. For the purposes of sections 6 and 7 -

(a) where a person has been present in Norfolk Island for less than the whole of a day, the person is to be taken not to have been present in Norfolk Island on that day; and

(b) where a person satisfies the Returning Officer -

(i) that the person has not attained the age of 25 years; and

(ii) that the person has been absent from Norfolk Island for the sole or principal purpose of undergoing full-time vocational training or full-time education,

the person is to be taken to have been present in Norfolk Island during the period of the person's absence.".

26. The residency provisions as they stood after the enactment of the above amendments differed in 3 ways from the pre-existing provisions in force between 1985 and 1991, as follows:

- Use of the terminology "resided in Norfolk Island" and "live in Norfolk Island" was abandoned. The appearance of such phrases in the legislation, like the earlier use during the period 1976-1985 of the phrase "ordinarily resident", had led to a good deal of legal debate about the application of the phrases to particular circumstances.

  The 1991 legislation was instead purely quantitative and refers simply to a person being "present in", or "absent from", Norfolk Island for the requisite number of days.

- The "aggregation test" was liberalised. The old test required the applicant to have resided in Norfolk Island either for a continuous period of 3 years, or for "periods totalling 2 years and 6 months during the period of 3 years", preceding the application for enrolment.

  The reference to "2 years and 6 months" equates, with a slight rounding-down, to the present aggregate requirement of "900 days". However, the period within which that aggregate was to count for qualification purposes was extended from 3 years to 4 years.

  The policy purpose was to legislate a greater degree of flexibility for persons temporarily absent from the Island.

  As the Introduction Speech in the Assembly noted:

  > "Since the link with immigration status was broken for electoral purposes in 1985, the general rule for first enrolment on the electoral roll is that a person must have been resident in Norfolk Island for 2½ years in the period of 3 years prior to their application for enrolment.
  >
  > It has been found that this provision is framed in such a way as to disadvantage those who have to travel frequently either for educational purposes, on business or otherwise. Accordingly, after extensive consideration, including computer runs to ascertain the general travelling patterns of the community, the present Bill is brought forward for consideration."

- In addition, further flexibility was afforded to persons undergoing off-Island education or vocational training. As will be appreciated, tertiary education and vocational training opportunities are limited in Norfolk Island, and it was considered desirable to make specific provision to

accommodate that fact. A number of cases had previously arisen in which young persons had lost the right to enrol because of temporary residence overseas for educational purposes.

The mechanism to achieve that aim is contained in paragraph 7A(b) of the *Legislative Assembly Act 1979*, set out at page 12 above.

27. The pre-1979 Ordinances relating to electoral matters were all made, as was then required, by the Governor-General of the Commonwealth. Similarly, after 1979 Norfolk Island enactments relating to electoral issues required, and still require, assent by the Governor-General (the Administrator is unable to give such assent, because the subject matter is not within the scope of Schedules 2 and 3 to the Norfolk Island Act).

28. Hence, every one of the legislative measures referred to above was approved by the Commonwealth, including the *Legislative Assembly Amendment Act 1991*.

29. When the Bill for that Act was introduced, it was accordingly referred to the Federal Department and to the Australian Electoral Commission for comment.

30. The Federal Department (then the Department of Arts, Sport, the Environment, Tourism and Territories) advised the Norfolk Island Government on 7 January 1991 that it:

> "… has no objection to the proposed law".

31. The Australian Electoral Commission proffered comment on certain aspects of the role of the Returning Officer, and on other issues unrelated to the present submission, but otherwise made no comment. Accordingly, the Bill was assented to by the Governor-General on 2 August 1991.

Detailed background – Australian citizenship issue

32. There are two elements to this issue:

(a) Australian citizenship as a proposed requirement for enrolment on the electoral roll; and

(b) Australian citizenship as a proposed requirement for election to the Legislative Assembly.

33. As noted in the General Background (paragraphs 6-9 above), the earlier requirement that a person must be an Australian citizen, or otherwise have "the status of a British subject", was abolished in 1985 in respect of qualifications for election to the Assembly and in 1986 in respect of qualifications for enrolment on the electoral roll.

34. These steps were initiated by the Commonwealth in 1984. On 20 January 1984, the Federal Department telexed to the Administrator in the following terms:

> "The Australian Citizenship Amendment Bill 1983 was introduced into the House on 7 December 1983. The Bill is designed to remove all discriminations from the Australian Citizenship Act 1948, to revise the oath of allegiance and to effect certain other changes to the [Citizenship] Act. ...
>
> In introducing the Bill the Minister for Immigration and Ethnic Affairs said that the Government was also moving to change the citizenship requirement for future permanent employment in the Public Service and the Defence Services from one of British subject status to one solely of Australian citizenship. The Minister assisting the Prime Minister for public service matters recently announced the Government's intention to amend the Public Service Act to this effect. Similar changes to the Commonwealth and State Electoral Acts to require Australian citizenship for future electoral enrolments will be proclaimed shortly.
>
> ....
>
> The Minister has received a letter from the Minister Assisting the Prime Minister for public service matters outlining the changes to be made to the Public Service Act and seeking the Minister's advice on the amendment of legislation for which he is responsible where British subject status is a requirement for employment. We are drafting a reply to this letter and recommending to the Minister that he consult with the Norfolk Island Government on amendments to the Public Service Ordinance 1979.
>
> We shall keep you informed on this question, in particular on proposed amendments to the *Norfolk Island Act 1979* and consequential amendments to other legislation.
>
> Meanwhile it would be appropriate for the Norfolk Island Government to give consideration to the removal or replacement of the words 'British subject' in Norfolk Island laws".

35. The Commonwealth followed-up the above initiative by letter to the then Chief Minister dated 22 October 1984:

> "As you know, sections 38 and 39 of the Norfolk Island Act 1979 prescribe Australian citizenship or other British subject status as a qualification for election to the Legislative Assembly. In line with the Government's policy these references to British subject status should be deleted. One option would be simply to delete the British subject status requirement, making Australian citizenship the qualification for membership of the Legislative Assembly. This would be consistent with recent amendments to the Electoral Acts of the Commonwealth and the States and would bring the Legislative Assembly into line with the State Parliaments. *The other option is to delete the citizenship requirement entirely. This would be consistent with the practice generally for local government, and perhaps better suited to Island circumstances.*

I should be grateful for a Norfolk Island Government view in relation to this question to enable discussion on appropriate amendments to the Act to be taken.

The Australian Citizenship Amendment Bill 1983 will abolish all references to 'British subject' in the Australian Citizenship Act 1948, including the definition of this term. Norfolk Island Ordinances which contain references to 'British subjects' will therefore need to be amended. I note that the Legislative Assembly Ordinance 1979, the Oaths Ordinance 1960, the Justices of the Peace Ordinance 1972, the Land Titles (Aliens) Ordinance 1979, the Immigration Act 1980 and the Public Service Ordinance 1979 all contain references to British subjects. Given the Commonwealth's commitment in this area, might I suggest that action now be taken to abolish these references.

As regards the Public Service Ordinance, the Minister Assisting the Prime Minister for public service matters sought the advice of the Minister as to whether it would be appropriate for the qualification for appointment under this Ordinance to be changed to Australian citizenship, with a power of waiver, as is now the case for the Australian Public Service. *The Minister's view is that the nationality requirement should simply be repealed as the circumstances of the Territory are such that the imposition of an Australian citizenship requirement could hinder successful recruitment"* (emphasis added).

36. The Norfolk Island Government adopted the above Commonwealth suggestions and: -

- Agreed with the Commonwealth's proposal to amend the Norfolk Island Act to omit altogether the requirements for Australian citizenship or British subject status as qualifications for membership of the Assembly.
  As previously stated, those changes to the Norfolk Island Act were effected by the Commonwealth in 1985.

- Agreed with the Commonwealth's proposal to amend a range of Norfolk Island enactments to like effect. As well as the *Legislative Assembly Act 1979*, the enactments so amended were as follows: *Liquor Act 1960, Public Service Act 1979, Crown Lands Act 1913, Justices of the Peace Act 1972, Immigration Act 1980*. These changes were given effect by the *Statute Law Revision (Status) (Nos. 1, 2 and 3) Acts 1986.*

37. Having implemented the Commonwealth's suggestions, the Norfolk Island Government reasonably expected that that was the end of the matter. However, the Commonwealth by 1990 had resiled from its position as expressed in 1984. On 24 October 1990, the then Minister, Mr Simmons, wrote to seek the Assembly's views:

"... on an amendment I propose to the Norfolk Island Act 1979 to re-instate Australian citizenship as a necessary qualification for membership of the Legislative Assembly".

38. The Minister's letter referred to the earlier correspondence of 1984 (paragraphs 34 and 35 above), and its outcome in 1985 and 1986, and went on:

> "Circumstances have changed since 1985 and the reasons for deleting the citizenship requirement are now less compelling, particularly in view of the Island's progress over the last 5 years towards internal self-government.
>
> The Norfolk Island Government now has authority over a wide range of Federal and State-type functions, including social security, radio and television, immigration, customs, telecommunications, labour and industrial relations, public health, energy planning and regulation, registration of medical practitioners, public works, to name but a few. The relationship between the Commonwealth and Norfolk Island is now more akin to a Federal-State relationship than a Federal-local government relationship. In these circumstances, the justification for not requiring Australian citizenship for membership of the Legislative Assembly on the basis of practice applying at the local government level would no longer seem appropriate.
>
> The Legislative Assembly of Norfolk Island is in every sense a Parliament. Reinstating an Australian citizenship requirement for membership of the Assembly would bring Norfolk Island into line with the Parliaments of the States and the Commonwealth. It would also be consistent with the qualifications for membership of the Legislative Assemblies of the ACT and the Northern Territory.
>
> While it could be argued that the small size of the population renders it undesirable to reduce the number of candidates available for election, persons living on Norfolk Island are eligible to apply for Australian citizenship under the same rules as apply on the mainland. Reinstating an Australian citizenship requirement for membership of the Assembly need not exclude foreign born residents of the Island from standing for election, provided they take out Australian citizenship.
>
> A related issue is the question of eligibility to vote in Assembly elections. It would be consistent with the qualifications for membership of the Assembly for Australian citizenship to be a pre-requisite for enrolment. This need not disenfranchise non-Australian citizens currently on the electoral roll. I suggest that, as with the approach adopted by the Commonwealth in relation to the eligibility of British subjects to vote in Federal elections, persons already enrolled be permitted to remain on the roll regardless of citizenship. However, only those with Australian citizenship would be qualified to stand as a candidate for election as a member of the Legislative Assembly".

39. The Assembly's response to the Minister's proposal was conveyed on 14 December 1990, and the key point was as follows:

> "You will no doubt be aware that the same proposal was put forward as one option in a paper distributed on the Island in late October by the House of Representatives Standing Committee on Legal and Constitutional Affairs'

> Inquiry into the Legal Regimes of the External Territories. The Norfolk Island Government's most recent submission to the Inquiry opposed the Australian citizenship proposal. ... I understand that the outcome of the Committee's deliberations – on this and other issues – will be made available early next year.
>
> ... as the Legal Regimes Inquiry has not yet reported, it would be premature for action to be taken at this stage to implement the proposal.".

40. The Norfolk Island Government addressed the issue in detail in its submission of October 1990 to the Legal Regimes Inquiry, and again in its February 1991 submission. It vigorously opposed the suggestion, advanced by the Inquiry Committee in virtually identical terms to the Minister's letter, that Australian citizenship be imposed as a qualification for voting and for standing for election.

41. Nonetheless, the Committee's Islands in the Sun report stated that:

> "... the Committee believes that the residency provision should be coupled with a citizenship requirement so that only Australian citizens be eligible to stand, or vote, in Legislative Assembly elections. This is consistent with the recent Commonwealth resolution to require Australian citizenship for voters in elections for the Christmas Island Assembly, and the Committee's recommendation with respect to both Christmas Island and the Cocos (Keeling) Islands.
>
> To achieve this result, the Committee favours gradual change to facilitate the phasing-in of this proposal – the citizenship requirement would only apply to all <u>new</u> enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined during 1991. Existing enrollees would not be affected by this proposal and could continue to receive all of their present rights.
>
> The Committee notes that, under these provisions, all current residents will be able to vote, together with Pitcairners and their descendants and residents of Norfolk Island who take out Australian citizenship. Only those of foreign nationality, unless they take out Australian citizenship, will be excluded.
>
> *Recommendation 41* – The Committee recommends that Australian citizenship be a requirement for eligibility to stand for election or to vote in Norfolk Island Legislative Assembly elections, for all new enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined before the end of 1991." (Islands in the Sun, pages 149-150, paragraphs 7.12.5 – 7.12.8. Original emphasis).

42. Subsequent to publication of the Committee's report in March 1991, the Norfolk Island Government made extensive representations to the Federal Minister. In the event, the then Federal Government did not proceed with implementation of the Committee's recommendation.

43. Nothing further was heard of the proposal until after the change of Federal Government in March 1996. It was revived two years later in March 1998. No prior consultation occurred, and accordingly no opportunity was afforded to make representations for the consideration of the Federal Government as a whole. Given the controversial previous history of the proposal, this is surprising.

44. The then Federal Minister, Mr Somlyay, announced the Federal Government's decision by letter dated 5 March 1998:

> "The Commonwealth ... wishes to take the opportunity to tidy up some anomalies in relation to voting and election rights of Australian citizens for the Norfolk Island Legislative Assembly. Some of these anomalies emerged several years ago when voting rights for British subjects were changed. The Norfolk Island Assembly is the only Parliament in Australia – Federal, State or Territory – where it is not now mandatory to be an Australian citizen to enrol in local elections, to be an Assembly member, or a minister in the Government. Unlike these other Parliaments, Australian citizens ordinarily resident on the Island at the time of the Island elections are not necessarily entitled to enrol to vote in Legislative Assembly elections.".

45. As before, a "grandfather clause" was proposed: "... we would wish to ensure that the present rights of all those on the Island's electoral roll should be preserved irrespective of their citizenship.".

46. The Norfolk Island Government reacted with asperity to this communication, and a delegation flew to Canberra one week later to meet the Federal Minister and to explain the basis for their objections to the proposal. This elicited a more elaborate justification of the proposals by the Minister, contained in a lengthy letter of 23 March 1998. The Minister referred to the Islands in the Sun recommendation, and framed his justification at both a general and also a specific level.

47. The general consideration was that:

> "In taking its decision, the Federal Government took the firm view that these issues were matters of fundamental national policy on which it had an obligation to act. The right of citizens to vote, and to vote in the jurisdiction in which they are ordinarily resident, is a central tenet of Parliamentary democracy throughout Australia. So too is the concept that Australian citizenship should be a prerequisite for voting and election to Australian Parliaments.".

48. The more specific justifications were as follows:

- "In essence [the proposals] restore limitations which applied when the Fraser Government established internal self-government on Norfolk Island in 1979.".

- There had been "a number of developments" since the previous Labor Government chose not to adopt the Islands in the Sun recommendation. A House of Representatives Committee had examined aspects of section 44

of the Constitution (which relates, among other things, to "allegiance ... to a foreign power" as a disqualification from membership of the Federal Parliament), and had reported that "the need to ensure that the primary loyalty of a member of the Australian Parliament is to Australia and to prevent subversion by foreign governments" was "very important and should be preserved".

- Two High Court decisions, *Sykes v Cleary* (1992) 176 CLR 77 and *Free v Kelly (1996)* 185 CLR 296, supported the Minister's position.

- Accordingly, the proposed changes would "... remove any possible doubt which may arise as a result of these more recent developments".

- Any practical problems arising could be overcome by dual citizenship, "... since Australian law does not require a person to renounce any other citizenship on assuming Australian citizenship". So far as New Zealanders were concerned, "the New Zealand High Commission has confirmed that a New Zealand–born person who acquires Australian citizenship can retain his or her New Zealand citizenship".

- The Minister wished to "... emphasise that, once the amendments are drafted, they will be provided to you for comment and input".

49. Though Ministerial responsibility has subsequently changed from Mr Somlyay, the above letter remains by far the most comprehensive exposition of the Commonwealth's position.

50. On 26 August 1998, a referendum was held in Norfolk Island (under the *Referendum Act 1964*). Voting in such referendums is compulsory. The question on which the opinion of the electors was sought was as follows:

> "The Australian Government has recently indicated its intention to bring about changes to Norfolk Island's electoral process. Given this situation do you feel it is appropriate that the Australian Government in Canberra dictates the electoral process on Norfolk Island?"

51. The result of voting was as follows:

	Number	Percentage
• In favour :	184	20.1%
• Against:	719	78.4%
• Informal:	14	1.5%

- Total votes cast: 917 100.00%

52. The outcome was communicated to Minister Somlyay on 28 August 1998. However, the October 1998 Federal election, and its preceding "caretaker status" prevented further progress on the issue.

53. Immediately prior to a visit to the Island, the new Minister, Senator MacDonald, wrote to the Norfolk Island Government on 19 January 1999 confirming that the proposals would be proceeded with. He stated that he needed "... to bring the matter to a conclusion as soon as possible", and that:

> "... the fundamentals of Cabinet's decision are immutable. I am however anxious to afford your Government the opportunity of working with the Commonwealth on the details of the proposed legislative changes".

54. In spite of the latter part of the above passage, the draft legislation was not forwarded to the Norfolk Island Government until 1 March 1999, on the basis that comments had to be received by 8 March, 5 working days later. The Norfolk Island Government responded by 9 March 1999, re-affirming its opposition to the Bill for the reasons discussed in the Commentary below. The preparation of a Bill to amend the Act, and the ultimate introduction of that Bill by Senator MacDonald was unilateral, and without appropriate consultation with the Norfolk Island Government.

55. In view of anecdotal criticisms of the form of the referendum question put to the electors on 26 August 1998, the Assembly resolved on 22 March 1999 to seek the opinion of the electors on a revised question, as follows:

> "Do you agree with the Australian Federal Government's proposal to alter the Norfolk Island Act so that:
>
> (1) people who have been ordinarily resident in the Island for 6 months will in future be entitled to enrol on the electoral roll for Legislative Assembly elections; and
>
> (2) Australian citizenship will in future be required as a qualification to be elected to the Assembly, and as a qualification for people who in future apply for enrolment on the electoral roll for Assembly elections".

56. The referendum was held on 12 May 1999, and the outcome was as follows:

	Number	Percentage
• In favour :	247	25.6%
• Against:	691	71.7%
• Informal:	26	2.7%
• Total votes cast:	964	100.00%

57. On 25 May 1999, the Senate resolved to note the referendum result and called on the Federal Government to enter into formal negotiations with the Norfolk Island Government in view of that result. The text of the resolution was as follows:

> "That the Senate:
>
> (a) notes that:
>
> (i) on Wednesday, 12 May 1999, the people of Norfolk Island voted in a referendum on the following question:
>
> Do you agree with the Australian Federal Government's proposal to alter the Norfolk Island Act so that:
>
> (a) people who have been ordinarily resident in the Island for 6 (six) months will in future be entitled to enrol on the electoral roll for Legislative Assembly elections; and
>
> (b) Australian citizenship will in future be required as a qualification to be elected to the Assembly, and as a qualification for people who in the future apply for enrolment on the electoral roll for Assembly elections.
>
> (ii) the result of that referendum was that 74 (sic) per cent of Norfolk Islanders voted no, with more than 90 per cent of the eligible community voting in that referendum; and
>
> (b) calls on the Government to now withdraw the Norfolk Island Amendment Bill 1999 and to enter into formal negotiations with the Government of Norfolk Island in view of the referendum result".

Commentary

58. The Norfolk Island Government's objections to the proposed electoral amendments are in outline as follows:

- The adverse impact on the Island's self-identity.
- The likely practical problems, and inequities, which will flow from the proposal.

Adverse impact on the Island's self-identity

59. The precise nature of Norfolk Island's constitutional relationship with Australia has been a matter of controversy since Federation. And prior to 1901, the Island's relationship with New South Wales was similarly controversial.

60. Norfolk Island has been a semi-autonomous polity for 143 years. Its degree of autonomy has varied. The Island was substantially self-governing from 1856, when

the Pitcairn settlers arrived, until 1896. That community did not derive from Australia. From 1896 until 1914, when the Island became a territory under the authority of the Commonwealth, NSW authorities took a more active role in the government of the Island, though there was still considerable autonomy. From 1914 until 1979 the Island was directly administered by the Commonwealth, but still there was an acceptance that integration was not appropriate. During that period, there were local representative institutions with advisory (but not legislative or executive) functions, and their views were given weight. In 1979, the Island gained a measure of self-government which has subsequently been significantly expanded.

61. The common thread in this historical process has been a dynamism, or tension, arising from the equivocal nature of the Island's status. In general, mainland authorities have tended to espouse integration with Australian political units, whereas Islanders have consistently resisted such an approach.

62. This dynamism has consistently existed since 1856, and continues today to be a very important factor in the Island's self-identity. It is a factor which is neither obsolete or obsolescent. If anything, and because the Island is at present under greater integrationist political pressure than it has been for about 20 years, it is a factor which is more relevant and live today than it was in the past.

63. Some examples of this political tradition are set out below:

1856 Governor Denison: "I went with Mr Nobbs and the magistrate carefully over the laws which I intended to propose to the public meeting of the inhabitants. I had drawn these out on my way from New Zealand, taking care to make the code as simple and as short as possible. *I based it upon the rules which had been found to suit the habits of the people at Pitcairn's Island*. ... I left untouched the rule which gave the women, as well as the men, a vote in the annual election of the Chief Magistrate".

1856 Royal Instructions of 24 June 1856 to the Governor of Norfolk Island: "And whereas the inhabitants of the said Island are chiefly emigrants from Pitcairn's Island in the Pacific Ocean, who have been established in Norfolk Island under our authority, *and who have been accustomed in the territory from which they have removed to govern themselves by laws and usages adapted to their own state of society, you are, as far as practicable ... to preserve such laws and usages, and to adapt the authority vested in you by the said recited Order-in-Council to their preservation and maintenance*".

1886 Resolution of public meeting: "The Community of Norfolk Island approve of the [proposed] substitution of the Government of New South Wales in place of the Imperial Government, *provided always, that no other change be made in the present constitution, without the sanction of the said community*".

1896 Oliver Commission (NSW): "As to the future of the Island, we have no hesitation in saying that an immediate change in the system of local

administration is absolutely necessary. *It may be here stated that the unanimous feeling of the Islanders is that annexation, as they understand it, to the Colony of New South Wales is most undesirable. ... we would respectfully point out that the application of the laws and system of Government in the Colony of New South Wales would not prove suitable to the Island community*, and further, that it is desirable to introduce a form of government which, while being effective, will not be altogether dissimilar to what the people have been accustomed to".

1903 Commission of Inquiry (NSW): "Among the more thoughtful and intelligent Islanders I found the idea of annexation very favourably entertained; but the majority of the community seemed to regard the matter with characteristic apathy, while many desired nothing more than that the present status quo should be maintained. *What result a referendum of the entire community would produce on the question of cession, whether to the Commonwealth or to New South Wales, none with whom I conversed hazarded an opinion, unless that cession to New South Wales would certainly not have many advocates"*.

1905 Opinion of the Secretary to the Federal Attorney-General's Department (Sir Robert Garran): "The Island could apparently be made a territory under the control of he Commonwealth by the joint operation of an Imperial Order-in-Council and a Commonwealth Act. *The effect of this would be that the Parliament could make laws for its government, and that it would be a dependency of the Commonwealth, not a part of the Commonwealth itself*, and the general laws of the Commonwealth would not be in force in the Island to any further extent than the Parliament thought fit to provide – nor would it necessarily be within the Commonwealth tariff fence. In other words, it would be in the same relation to the Commonwealth as British New Guinea will be if the Papua Bill is passed".

1913 Debate on second reading of Norfolk Island Bill 1913. Mr Glynn (Minister for External Affairs): "In 1897, the question was raised as to what should be done with the Island, and *it was pointed out that there could be no annexation by New South Wales or the Commonwealth except by an Act of the Imperial Parliament. But, by an Order-in-Council, the island can be placed under the control of the Commonwealth. ...*

Mr Laird Smith: Have the people of the Island been consulted?
Mr Glynn: They know what is going on; but they have not been consulted by the Government.

Mr Laird Smith: They strongly resented it being taken over by New South Wales".

1914 Attlee Hunt (Secretary to the Department of External Affairs) Report: "For some years there has been considerable uncertainty among the

inhabitants as to what action the Federal Government and Parliament would take with respect to them. *Strong statements as to their antipathy to the suggested transfer to the Commonwealth have been made"*.

1926 Royal Commission received representations from 12 of the 19 then surviving original settlers from Pitcairn Island, that the Government's original promises to the Pitcairners had not been honoured. Administrator recalled.

1955 Petition signed by 375 of the Island's 583 adults, addressed to Her Majesty, asking for the restoration of "the democratic right of control over our domestic affairs".

1976 Nimmo Report recommended:

- That if the Commonwealth Government continued to accept responsibility for Norfolk Island then it should remain a Territory for at least 5 years.

- That residents should vote in Federal elections, and for this purpose the Island should be included in the electorate of Canberra.

- That the advisory Norfolk Island Council should be replaced by a Legislative Assembly.

- That Commonwealth social security and taxation should apply to the Island.

1977 Response of the Norfolk Island Council to the Nimmo Report:

- Federal Parliamentary representation – "The people of Norfolk Island do not seek or wish to be included ... in a mainland electorate".

- Extension of Commonwealth social security and taxation legislation – "Council does not accept this recommendation and, instead, proposes that the Norfolk Island Assembly have authority to institute its own form and levels of social security payments. ... and suggests that the Assembly should have authority to conduct its own tax system on the Island and to retain that tax for local needs".

1978 Federal Government announcement as to its response to the Nimmo Recommendations:

- "The Federal Government is prepared over a period to move towards a substantial measure of self-government for the Island, and is also of the view that, although Norfolk Island is part of Australia and will remain so, *this does not require Norfolk Island*

to be regulated by the same laws as regulate other parts of Australia".

- "The present situation under which laws of the Australian Parliament only apply to the Island if special provision is made in the particular law, would continue".

- "For the present Australian taxation and Australian social security benefits would not be extended to the Island".

- "The Government would see if the Island can develop an appropriate form of Government involving its elected representatives under which the revenue necessary to sustain that Government will be raised internally under its own system of law".

- "There would be no decisions taken on the question of representation in the Commonwealth Parliament until after consultations have been held with the Legislative Assembly".

1987 Report of the Constitutional Commission's Advisory Committee on the Distribution of Powers:

- "The Government of Norfolk Island proposed several amendments to the Constitution in order to formally recognise the special status of the Island".

- "The Norfolk Island Government seeks a special relationship with the Commonwealth. We point out that machinery does exist which could accommodate the island having a 'free-association' status with Australia, similar to the relationship of the Cook Islands with New Zealand. This could be provided under sections 51(xxix) [external affairs] and 122, with Australia having responsibility for the Island's external affairs and defence".

1991 Islands in the Sun Report recommends:

- The Commonwealth Parliament amend the Commonwealth Electoral Act to give optional Federal electoral enrolment rights to the people of Norfolk Island, the electorate to which the voters would be attached to be determined on the advice of the Australian Electoral Commission.

- Australian citizenship be a requirement for eligibility to stand for election or to vote in Norfolk Island Legislative Assembly elections, for all new enrollees registering on the Norfolk Island electoral roll on or after a commencement date to be determined before the end of 1991.

- The Department of Social Security establish a formal review mechanism to monitor the adequacy of social security provisions on Norfolk Island.

- The Commonwealth Grants Commission undertake a review of living standards, social security provisions and economic base of Norfolk Island.

1991 Norfolk Island Government calls referendum to ascertain the opinion of the electors on the question: "With respect to matters discussed by the Legal Regimes Inquiry, including the question of Federal representation, should the constitutional position of Norfolk Island be changed?". 82.3% vote "no"; 16.9% vote "yes"; 0.8% of votes are informal.

1992 After consultation with the Norfolk Island Government (and a further Norfolk Island referendum), the Commonwealth Electoral Act was amended to provide for optional enrolment for Norfolk Island residents. However, in accordance with the Norfolk Island Government's views the Island is not placed within a particular electorate – instead, and broadly speaking, persons are entitled to enrol in a mainland electorate with which the person has a connection.

Federal Government does not proceed with implementation of recommendations relating to Australian citizenship for Norfolk Island elections.

1997 Commonwealth Grants Commission Report on Norfolk Island finds that:

- "Norfolk Island is unique. In judging the services, infrastructure needs and revenue raising on the Island, account must be taken of the demographic, social and cultural aspects of the community ...".

- "Norfolk Island's financial dependence on the Commonwealth is comparatively low".

- Taking over additional powers suggested during the inquiry should be within the financial capacity of the Norfolk Island Government provided it increased its revenue raising effort".

- "There is a need for improved communication between the Commonwealth and Norfolk Island Governments".

- "A review of the Norfolk Island Act 1979 is needed to clarify responsibilities, make the Act more administratively useful and strengthen accountability ...".

1997 Norfolk Island's legislative powers over euthanasia are removed by the Commonwealth.

1998 Minister Somlyay announces revival of proposal for Australian citizenship qualification for Norfolk Island elections, coupled with a new proposal to radically shorten the residence qualification for enrolment.

1998 Norfolk Island referendum rejects Minister's proposal: see paragraphs 50-51 above.

1999 *January*. Minister MacDonald re-affirms Minister Somlyay's proposal.

1999 *March*. Island to Islands Report tabled (Joint Standing Committee on the National Capital and External Territories' report into Communications with Australia's External Territories).

Recommends that "... in the twentieth year of its operation, the Government initiate a review of the Norfolk Island Act with particular reference to the anomalies that arise as a result of the Act as far as the citizens of Norfolk Island are concerned". The "anomalies" referred to appear to be the non-application of the Trade Practices Act and (Federal) Telecommunications Act to Norfolk Island.

1999 *March*. Human Rights and Equal Opportunity Commission recommends to the Federal Attorney-General in its "Territorial Limits" Report that the (Federal) Migration Act 1958 be extended to Norfolk Island, that the Island's own immigration legislation be repealed and that the Legislative Assembly's power to legislate for immigration be revoked.

1999 *March*. Norfolk Island Amendment Bill 1999 introduced into the Federal Parliament.

1999 *May*. Electoral proposals in Bill again rejected by Norfolk Island referendum: see paragraphs 55-56 above.

1999 *May*. Senate resolves to note the referendum result and calls on Federal Government to enter into formal negotiations with the Norfolk Island Government (see paragraph 57 above).

64. The examples set out above are by no means exhaustive. What they amply demonstrate is a consistent tension between, on the one hand, a continuing Island effort to preserve the unique nature of the polity and, on the other, a continuing metropolitan endeavour to remove "anomalies" by treating the Island as if it were an integral part of Australia.

65. In the context of the present inquiry, the philosophical basis of it can be gleaned from Mr Somlyay's letter of 23 March 1998 (paragraphs 47-48 above), which refers to:

- The right of citizens to vote in the jurisdiction in which they are ordinarily resident, which is a "central tenet of Parliamentary democracy *throughout Australia*".

- The concept that Australian citizenship should be a prerequisite for voting and election to *Australian Parliaments*".

66. These are, the Minister said: "... matters of fundamental national policy", and there was a "need to ensure that the primary loyalty" of parliamentarians is "to Australia", in order to prevent "subversion by foreign governments".

67. Placing that expression of the philosophical basis of the terms of reference into the historical context set out above, it will readily be seen why the Norfolk Island Government regards the present inquiry as provocative, insensitive and impolitic.

68. It is provocative because it proceeds from an ideological view as to the Island's status which must have been known to the Federal Government to be utterly unacceptable to the Island's residents.

69. It is insensitive because it calls into question the undoubted loyalty of Norfolk Islanders to Australia, expressed in dark allusions to "subversion by foreign governments". Norfolk Islanders have fought with Australian colonial, and later Federal, defence services in the Boer War, the two World Wars, Korea, the Malayan Emergency, Vietnam and the Gulf War. Norfolk Islanders are loyal to Australia. What they want in return is an acknowledgment that, as R.J. Ellicott QC and M.H. McCelland QC advised in 1975:

> "... the Commonwealth Parliament's relationship to [Norfolk Island] is not that of a sovereign exercising power over part of its own territory, but that of a sovereign exercising power over territory committed to its government but not as part of its territory".

70. It is impolitic because there is at present a convergence of events which, by weight of circumstances, may force Norfolk Island into a position where it is compelled to initiate a fundamental re-appraisal of the Island's relationship with Australia, in order finally to settle the Island's status as a matter of both domestic and international law.

71. The 1979 Federal position that "although Norfolk Island is part of Australia and will remain so, this does not require Norfolk Island to be regulated by the same laws as regulate other parts of Australia", is a position which, had it been adhered to by the Commonwealth, would have avoided divisive and resource-intensive debate over the Island's fundamental status. The Commonwealth's profession that the Island is part of Australia would have remained unchallenged, so long as the Island's desire for autonomy was in the process of being fulfilled. Regrettably though, measures like the present inquiry are antithetical to autonomy and are therefore likely to result in pressure on the Norfolk Island Government to resolve the issue of the Island's fundamental status once and for all.

72. The above consideration underlies the Norfolk Island Government's comments to the Prime Minister about the proposed Constitution Alteration (Preamble) Bill in a letter dated 30 April 1999:

> "There is a convergence of events constituted by the Norfolk Island Amendment Bill, the changes to the Constitution proposed by the Preamble Bill and the Republic Bill, the imminent twentieth anniversary of self-government (which will occur in August of this year) and – more generally – a desire on the part of Island residents to see out the twentieth century having achieved a more durable constitutional understanding with the Commonwealth, which will be less hostage to political fortune than at present and which will enhance the self-government of Norfolk Island without the recurrent distractions occasioned by the present state of affairs".

73. For the reasons given, a proposal such as that anticipated by the current inquiry will have an adverse impact on the Island's self identity.

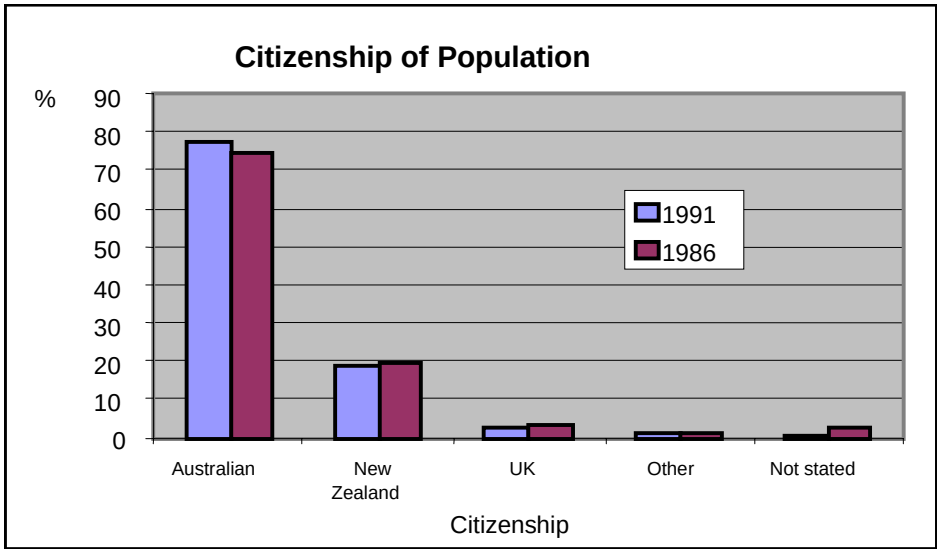
Likely practical problems and inequities

74. The most obvious practical effect of the Australian citizenship proposal is that it may – and probably will – disenfranchise a considerable part of the population.

75. The most recent Norfolk Island Census of Population and Housing, conducted by the Administration of Norfolk Island on 6 August 1996, shows that 80.8% of the *permanently* resident population held Australian citizenship, 16.0% held New Zealand citizenship, 1.7% held UK citizenship and 1.5% held other citizenships.

76. Comparative figures for the previous two censuses (6 August 1991 and 30 June 1986) are as follows:

Figure 2: Source – Census 1986 & 1991



77. The proportion of New Zealanders in the *temporarily* resident population is higher than for permanent residents:

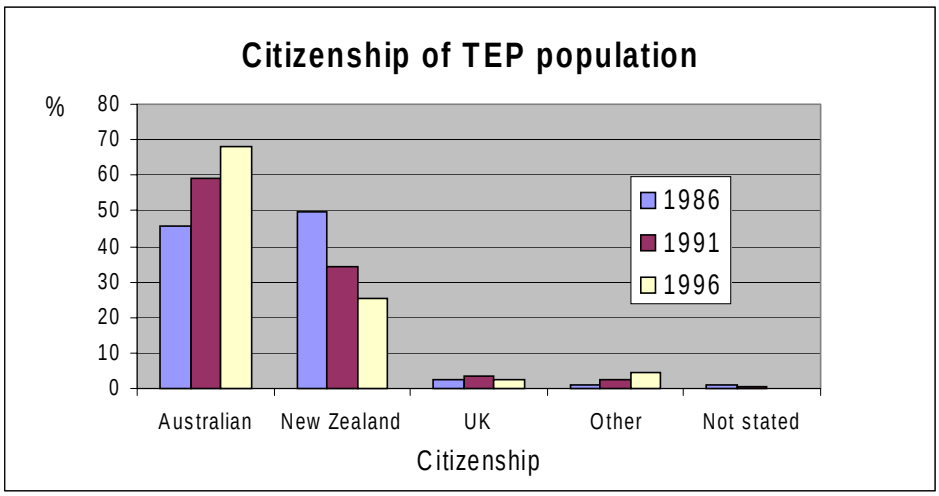


Figure 3 : Source: Census

78. In both the permanently and temporarily resident populations there has been some demographic shift towards a larger proportion of Australian, as opposed to New Zealand, citizens. This has been relatively insignificant in the permanent population since 1986 (the equivalent of only about 90 persons). The trend is more marked in the temporary population (which had, however, fallen considerably in absolute terms: from a total of 434 in 1991 to a total of 302 in 1996).

79. Nonetheless, the demographics of the Island reflect its close economic, cultural and historical links with New Zealand. A very significant minority of the permanent population are New Zealand citizens.

80. The anticipated responses to the above point about disenfranchisement are that:

- Dual citizenship is available. See for example the passage from Mr Somlyay's letter quoted at page 13 above (particularly the reference to the information provided by the New Zealand High Commission).

- Persons presently enrolled will not be disenfranchised, but will be permitted to remain on the roll.

81. The dual citizenship argument is, however, contrary to the principles said to underly the measures proposed in the inquiry: if citizenship is required as a demonstration of commitment and allegiance, then what commitment is demonstrated by the holding of dual or multiple citizenships? That very point was considered by the High Court in the litigation concerning Senator-elect Hill, where the Court determined that the holder of dual Australian and UK citizenships is disqualified from election because UK citizenship betokens "allegiance to a foreign power"[7].

[7] Sue -v- Hill 1999 HCA 30

82. The argument based on the existence of a "grandfather" clause is disingenuous. That argument would seek to minimise the practical effects of the proposed changes, when it is obvious that those effects will take many years to reach their full extent. This will further reduce the already small pool of persons from which the Assembly, and hence the Norfolk Island Government, draws its membership.

83. To the Norfolk Island Government, it appears that the gist of the situation is that the Commonwealth wishes to exclude New Zealanders from the self-government of a community of which they constitute a significant part. The fact that the Commonwealth is not prepared to face the consequences of immediate disenfranchisement is irrelevant: in the long run the many New Zealanders who are part of the Norfolk Island community may be excluded from participation in their governing institutions. There are very strong links between Norfolk Island and New Zealand (as indeed there are between Australia and New Zealand) and hence a proposal to disenfranchise a significant proportion of the Island's population – and, to an even greater extent, their children and grandchildren – renders the earlier Commonwealth references to the "removal of all discriminations" (page 14 above) particularly ironic.

84. Further, the assumption should not be made that Norfolk Island residents of Pitcairn Island descent necessarily hold Australian citizenship. Many Pitcairn descendants – for medical or other reasons – are in fact born in New Zealand. According to the 1996 census, 22.7% of the permanent population were born in New Zealand, and 46.5% of the permanent population were of Pitcairn descent. Accordingly, although directly-applicable figures are not available, it may be that up to one-fifth of Pitcairn descendants were born in New Zealand.

85. Next, it is submitted that the proposed measures are illogical.

86. There is little logic in requiring Australian citizenship for electoral purposes only, and not for other situations of trust and influence. As is pointed out at paragraphs 35 and 36 above, in the 1980s the Commonwealth proposed, and the Norfolk Island Government agreed, to remove citizenship/British subject status requirements from a range of Norfolk Island enactments. The enactments concerned are listed at paragraph 36. The most important of them were the *Public Service Act 1979* and the *Immigration Act 1980*.

87. Before its amendment, the Public Service Act required British subject status as a qualification for appointment to an office in the Norfolk Island Public Service. A putative proposal to restrict such appointments to Australian citizens was considered inappropriate by the Commonwealth in 1984, as "... the imposition of an Australian citizenship requirement could hinder successful recruitment" (paragraph 35 above).

88. With respect to the *Immigration Act 1980*, that also originally required British subject status in order to obtain a declaration of residency. Likewise, such a declaration could later be revoked if the person afterwards ceased to have that status.

89. The Norfolk Island Government is aware of no present Commonwealth initiative to require Australian citizenship as a qualification for appointment to the Island's public service, or for obtaining and keeping residency status in the Island.

CONCLUSION:

For the reasons outlined above, the Norfolk Island Government submits that :

1. **Any change of requirements to the qualifications of electors on the Norfolk Island Electoral Roll, or for election to the Legislative Assembly, are matters within the responsibility of the Norfolk Island Government under the *Legislative Assembly Act 1979.***
2. **The committee should give consideration to recommending mutual intergovernmental negotiations and discussion for any future proposals arising out of the concerns of individual Ministers, or Cabinet, before the unilateral referral of such concerns to a committee of inquiry.**
3. **The Committee should give consideration to recommending that the terms of reference of the current inquiry become matters for mutual intergovernmental discussion and agreement with a view to the Norfolk Island Government taking appropriate legislative action under the *Legislative Assembly Act 1979,* if there is a community mandate for change.**
